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# Supreme Court of the United States

October Term, 1949

No. 474

WALTER N. SMITH, et al.,

*Petitioner,*

AGAINST

HON. WILLIAM O'DWYER, Mayor of the City of New York; LAZARUS JOSEPH, Comptroller; VINCENT IMPELLITTERI, President of Ctiy Council; HUGO E. ROGERS, JAMES J. LYONS, JOHN CASHMORE, JAMES A. BURKE, and CORNELIUS A. HALL, constituting the Board of Estimate; HON. WILLIAM REID, Chairman; FRANK X. SULLIVAN, Commissioner, and SIDNEY H. BINGHAM, constituting the New York City Transit Commission, et al.

## PETITION AND BRIEF FOR WRIT OF CERTIORARI

WALTER N. SMITH,
*Appearing in Person,*
115 West 60th Street,
New York, N. Y.

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# Supreme Court of the United States

October Term, 1949

No.

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WALTER N. SMITH, et al.,

*Petitioner,*

against

HON. WILLIAM O'DWYER, Mayor of the City of New York; LAZARUS JOSEPH, Comptroller; VINCENT IMPELLITTERI, President of City Council; HUGO E. ROGERS, JAMES J. LYONS, JOHN CASHMORE, JAMES A. BURKE, and CORNELIUS A. HALL, constituting the Board of Estimate; HON. WILLIAM REID, Chairman; FRANK X. SULLIVAN, Commissioner, and SIDNEY H. BINGHAM, constituting the New York City Transit Commission, et al.

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## Petition for Writ of Certiorari.

May it please the Court:

The petition of Walter N. Smith respectfully shows to Honorable Court:

## Summary Statement of the Matter Involved.

1. Whether in an action for a permanent injunction to restrain and enjoin defendants-respondents from increasing the 5 cent fare, a vested right of the inhabitants of the City of New York that was acquired by judgment under Section 877 of the Civil Practice Act of the State of New York, when the rights thereto depends upon the nature of the action and the Supreme Court, Special Term, Part 3, thereof dismisses

plaintiff's complaint and denies the motion on the authority of *Klein* v. *O'Dwyer,* a motion for a temporary injunction decided and entered in the New York Law Journal on the 21st day of June, 1948, is due process of law. And the dismissal of the appeal in the Court of Appeals was likewise not due process of law in violation of the 14th Amendment to the Federal Constitution. The order and the opinion of the *Klein* case is printed in full on page 60 of papers on appeal duly served and filed in the office of the Clerk of the Court of Appeals in Albany, N. Y. and the calender number is 195. And whether the ex parte order, making the order of the Court of Appeals and making said order the order of the Supreme Court, signed by Mr. Justice Nathan, Jr., dated August 4, 1949, without notice to petitioner and an opportunity to be heard, is due process of law in violation of the 14th Amendment to the Federal Constitution.

2. That prior to the commencement of this action your petitioner on February 8, 1947, and July 29, 1947, protested against any raising of the five cent fare (printed in papers on appeal, pages 18, 19, 20 thereof). Your petitioner requested Hon. Thomas J. Curran, Secretary of State of the State of New York, Albany, New York, for a copy of Chapter 488 of the Session Laws of 1948 as provided in Section 380 of the Civil Practice Act of the State of New York and upon examination thereof your petitioner printed in full in his brief Point 4. That after the motion in the Court of Appeals on July 19, 1949, your petitioner went down to the public library, 5th Avenue and 42nd Street, New York City, checking on authorities. I discovered that said Chapter 488 of the Laws of 1948 was different from the one that I received from the Secretary of State, quoted above, in that it contained a re-enactment of Section 36 that had been expressly and absolutely repealed with a material variance in that its provision striking out the Board of Estimate elective officers and substituted the Transit Commission of the City

of New York, appointed by the Mayor without any charges of any kind a notice and an opportunity to defend against the restriction placed upon the Legislature by the Constitution of the State of New York and the 14th Amendment to the Constitution of the United States.

3. The re-enactment of Section 36 that had been expressly and absolutely repealed seems unconstitutional and void as violation of the 14th Amendment to the Federal Constitution, and as discriminatory in direct contravention of Art. 6, Sec. 9a, Sub. 2; Art. 1, Sec. 11; Art. 13, Sec. 2, of the Constitution of the State of New York.

## Reasons Relied on for Allowance of the Writ.

1. The Supreme Court of the State of New York having ignored the federal question in Mr. Justice Hecht's order and opinion upon which Mr. Justice Botein relied, in a way not in accord with applicable decisions of the Court of Appeals of the State of New York and the Supreme Court of the United States (see Points 1, 2, 3 of petitioner's brief, filed in the Clerk's office of the Court of Appeals and served upon defendants) and the ruling presents an important and grave question of law (see pages 21, 22 and 23 in papers on appeal).

2. That the construction of the lower Courts and that of the Court of Appeals takes property of petitioner for use of the transit commission and in aid of a monopoly in serving the public without any compensation; it takes property of petitioner without due process of law and denies to him the equal protection of the laws in violation of the 14th Amendment to the Federal Constitution and those of the Constitution of the State of New York.

3. It compels a waiver of a constitutional right and seems an exercise of arbitrary power in government.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 195, Walter N. Smith, et al., appellants, v. Hon. William O'Dwyer, et al., defendants-respondents, and that the said orders of the Supreme Court and that of the Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WALTER N. SMITH,
*Appearing in Person.*

# Supreme Court of the United States

October Term, 1949

No.

WALTER N. SMITH, et al.,

*Petitioner,*

against

HON. WILLIAM O'DWYER, Mayor of the City of New York; LAZARUS JOSEPH, Comptroller; VINCENT IMPELLITTERI, President of City Council; HUGO E. ROGERS, JAMES J. LYONS, JOHN CASHMORE, JAMES A. BURKE, and CORNELIUS A. HALL, constituting the Board of Estimate; HON. WILLIAM REID, Chairman; FRANK X. SULLIVAN, Commissioner, and SIDNEY H. BINGHAM, constituting the New York City Transit Commission, et al.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### The Opinion of the Court Below.

The opinion of Mr. Justice Hecht of the Supreme Court, Special Term, Part 3, upon which Justice Botein relied, dismissed complaint of petitioner and denied the motion, is printed in full on pages 60, 61, 62, 63, 64, 65, 66 of papers on appeal.

### Jurisdiction.

The date of final order appealed from is July 1, 1948.

The 38th Rule, paragraph 5 (a) of Revised Rules of this

Court provides that where a State has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable of this Court. The final order is printed on page 3 of papers on appeal. It is contended that this Court has jurisdiction to review the final orders of the Courts below who has decided an important question of Federal law in a manner seems untenable and it is differentially submitted that the foregoing reasons bring the petition herein within the aforementioned rule: these, in the interest of brevity, are not repeated here.

## Statement of the Case.

Your petitioner for himself and the inhabitants of the City and State of New York brought a motion for a permanent injuction to restrain and enjoin defendants from raising the five cents fare. Order to show cause and affidavit were served on the 25th day of June, 1948, made returnable June 29th thereof. The five cent fare had become vested by judgment of this Honorable Court and the highest and high standing Courts of the State of New York. The motion came on to be heard before Mr. Justice Botein then sitting in Special Term, Part 3 of the Supreme Court of the State of New York. Said Justice dismissed the complaint and denied the motion of petitioner on the authority of *Klein* v. *O'Dwyer, et al.,* decision and order for a temporary injunction decided June 21, 1948, and reported in the New York Law Journal on June 24, 1948.

That thereafter your petitioner, on the 25th day of August, 1948, served upon defendants and filed in the County Clerk's Office a notice of appeal to the Court of Appeals. That subsequent to the service and filing of said notice of appeal defendants served petitioner with a notice to dismiss said notice of appeal in the Court of Appeals upon the grounds

that said Court has not jurisdiction to entertain the same returnable July 19, 1949. That on the date of the motion your petitioner submitted. That thereafter your petitioner went down to the public library on 5th Avenue and 42nd Street to check on authorities and found that Chapter 488 of the Laws of 1948 was not the same as the one that I received from the Secretary of State in that it contained a paragraph re-enacting Section 36 that had been expressly and absolutely repealed, striking out the Board of Estimate elective officers and substituting the Transit Commission appointed by the Mayor.

That on August 11, 1949, your petitioner received through the mail a notice of entry of the order of that Court, dismissing petitioner's appeal and under the same cover a paper purporting to be an ex parte order signed by Mr. Justice Nathan, Jr., sandwiched between the notice of entry and the notice of taxation of costs without notice to your petitioner and an opportunity to make objections.

The theory upon which the lower Courts reached its conclusions seems to disregard the 14th Amendment to the Federal Constitution. The Constitution of the State of New York established decisions of this Honorable Court, vested rights of petitioner and violation of existing laws. Said motion was made by virtue of Section 877 of the Civil Practice Act of the State of New York.

## Specification of Errors.

1. The Court in Special Term of the Supreme Court, Part 3 thereof, exceeded its jurisdiction.

2. That petitioner and the inhabitants of the City of New York and those of the State acquired a vested right in the five cents fare by judgment of this Honorable Court and the highest and high standing Courts of the State of New York.

It seems error for the Court to disregard that fact as existed prior to commencement of the action below and seems reversible error.

3. That Mr. Justice Hecht erred in construing Section 36 and other sections disregarding Chapter 461 of the Laws of 1947, the amendment, designated in Chapter 488 of the Laws of 1948 as Section 36 (c) and renumbered Section 38 and seems reversible error.

4. It seems error for the Court to construe a statute that has been expressly and absolutely repealed.

5. The petitioner's complaint and denial of his motion for a permanent injunction seems reversible error.

6. The dismissal of petitioner's appeal in the Court of Appeals seems likewise reversible error.

7. The taxing of costs seems an abuse of discretion.

8. That the errors throughout the whole case seem an exercise of arbitrary power in government.

9. The re-enacting of Section 36 that has been expressly and absolutely repealed seems not within the expressed intention of the Legislature.

## Summary of Argument.

1. That prior to the commencement of this action below, your petitioner and the inhabitants of the City and State of New York had a vested right in the five cents fare; such right was acquired by judgment of this Honorable Court and the highest and high standing Courts of the State of New York.

2. A vested right is property and as such depends upon the 14th Amendment to the Federal Constitution for its protection.

3. That the *Klein* case upon which Justice Botein relied seems not *res judicata* in the case at bar.

4. The Courts in Special Term, Part 3 thereof exceeded its jurisdiction in the premises.

5. The dismissal of petitioner's complaint and denial of his motion for a permanent injunction to restrain and enjoin defendants from raising the five cents fare seems reversible error and an exercise of arbitrary power in government (Points 1, 2 and 3 of brief submitted below).

6. The dismissal of petitioner's appeal in the Court of Appeals seems likewise reversible error and an exercise of arbitrary power in government (affidavit and memorandum in opposition in Court of Appeals).

7. The re-enactment of Section 36 that has been expressly and absolutely repealed seems not within the express intention of the Legislature.

8. The notice of entry of the order dismissing petitioner's appeal received by petitioner on the 11th day of August, 1949, a paper purporting to be an ex parte order signed by Mr. Justice Nathan, Jr., seems not due process of law and without statutory authority.

9. That the damages herein are presumed and direct (Point 14 of brief).

10. The excess profits of defendants seems forfeited by reason of their violation of existing laws (Point 15 of brief).

11. Damages may be ascertained and determined by the Court (Point 12 of brief submitted below).

12. That the report of the Transit Commission seems incomplete (Point 7 of brief).

## *ARGUMENT.*

## POINT 1.

**It is not due process of law where courts apply a rule in absolute disregard of the statutes and the just rights of a party.**

*Shelly* v. *Kramer,* 334 U. S. 1;
*Hurd* v. *Hodge,* 334 U. S. 24;
*Smith* v. *Texas,* 311 U. S. 128, 130;
*Frost, et al.* v. *Railroad Comm. of State of California,* 271 U. S. 583;
*Home Tel., etc., Co.* v. *Los Angeles,* 227 U. S. 278;
*Traux* v. *Raich,* 239 U. S. 33;
*Lither, et al.* v. *United States,* 334 U. S. 742, 783, 786, 791;
*Chicago B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226;
*Davidson* v. *New Orleans,* 96 U. S. 97;
*Murdock* v. *Penn,* 319 U. S. 105;
*Mitchell* v. *United States,* 313 U. S. 94, 95, 96, 97.

In *Shelly* v. *Kramer,* supra, Chief Justice Vinson said among other things in course of his opinion:

> "The rights created by the due process and equal protection clause of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights."

Again:

> "State action within the Fourteenth Amendment refers to exertions of State power in all forms and when the effect of that is to deny rights subject to the protection of the 14th Amendment it is the obliga-

tion of the Supreme Court of the United States to enforce the Constitutional commands."

Again:

"The power of State to create and enforce property interest must be exercised within the boundaries defined by the 14th Amendment."

In *Hurd* v. *Hodge,* supra, Chief Justice Vinson, in delivering the opinion of the Court, confirmed and ratified as confirmed all legal precedents on the subject, not forgetting personal property, the 14th Amendment he said were closely related both in inception and in the objectives which Congress sought to achieve.

In *Smith* v. *Texas,* supra, Mr. Justice Black said at page 130:

"The 14th Amendment requires that equal protection to all must be given, not promised."

In *Murdock* v. *Penn,* supra, Mr. Justice Douglas said at page 113:

"A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution."

In *Mitchell* v. *United States,* supra, Chief Justice Hughes said at page 94:

"The denial to appellant of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against State action by the 14th Amendment."

In *Traux* v. *Raich,* supra, Chief Justice Hughes said:

"The provisions of the Fourteenth Amendment are universal in their application to all persons within the territorial jurisdiction of the United States, without

> regard to any difference of race, color, or of nationality, and the equal protection of the laws is a pledge of equal laws."

In this case the State of Arizona sought to justify their action under the exercise of police power to make reasonable classification in legislating to promote the health, safety, morals and welfare of those within its borders.

The Chief Justice further held that class legislation and discrimination are prohibited by the Fourteenth Amendment.

In *Home Tel., etc., Co.* v. *Los Angeles,* supra, Chief Justice White held that

> "the prohibitions contained in the Fourteenth Amendment extends to all acts of the State, whether through its legislative, its executive, or its judicial authorities."

In *Frost, et al.* v. *Railroad Comm. of California,* supra, Mr. Justice Sutherland said in course of his opinion:

> "But the power of the State in that respect is not unlimited and one of the limitations is that it may not impose conditions which require the relinguishment of Constitutional rights."

## POINT 2.

**Res judicata and vested rights as well may be pleaded in bar to an action in any court, because the protection of vested rights is the supreme duty of the Courts.**

*Gilchrist* v. *Interborough Rapid Transit Commission,* 279 U. S. 159;
*City of New York* v. *Interborough Rapid Transit Co.,* 257 N. Y. 20, 27;

*City of New York* v. *Interborough Rapid Transit Co.*, 232 App. Div. 223;
*Transit Commission* case 2972, Sept. 18, 1929;
*Hansberry* v. *Lee*, 311 U. S. 32, 42, 43;
*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381;
*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66;
*Chicot County Drainage Dist.* v. *Baxter State Bank, et al.*, 308 U. S. 371;
*Louchs* v. *Standard Oil Co.*, 224 N. Y. 90;
*Long Island, etc., Co.* v. *Brooklyn*, 166 U. S. 691.

In *Hansberry* v. *Lee*, supra, Mr. Justice Stone, delivering the opinion of the Court, said at pages 42, 43:

> "It is familiar doctrine of the Federal Courts that members of a class not present as parties to the litigation may be bound by the judgment where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. In all such cases we may assume for present purposes that such procedure affords protection to parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit reversed."

In *Treinies* v. *Sunshine Mining Co.*, supra, Mr. Justice Black held the principles of *res judicata* as applies to jurisdiction relate both to jurisdiction of the subject matter and of parties.

In *Chicot County Drainage Dist.* v. *Baxter State Bank*, supra, Chief Justice Hughes held *res judicata* may be pleaded

as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceedings, but also as respects any other available matter which might have been presented to that end.

In *Louchs* v. *Standard Oil Co.*, supra, Mr. Justice Cardozo said at page 110:

> "But it is a principle of every civilized law that vested rights shall be protected, the plaintiff owns something, and we help him get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid; if aid is to be withheld here it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare."

And finally at page 113:

> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained, at least, that is so among the States of the union."

In concluding this point it seems safe to say that the first four of the cases gave petitioner and the inhabitants of the City and State of New York a vested right in the five cents fare, the latter re-establishes and ratifies the principle of *res judicata* and vested rights.

## POINT 3.

**The Court in Special Term exceeded its jurisdiction in the premises, because Section 36 had been expressly repealed.**

*United States* v. *Griffin*, 303 U. S. 226.

In *United States* v. *Griffin*, supra, Mr. Justice Brandies said at page 2:

> "From the decree the United States and the Interstate Commerce Commission have appealed to this Court. Here, also answering to the merits, they challenged jurisdiction of the District Court. Since lack of jurisdiction of a Federal Court touching the subject matter of the litigation cannot be waived by the parties. We must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed. Cf. memorandum submitted in opposition to dismiss appeal in the Court of Appeals. The Statute upon which the Court at Special Term, Part 3 thereof based its order and decision had been repealed prior to the commencement of the action and therefore exceeded its jurisdiction."

## POINT 4.

**The re-enactment of Section 36 that had been expressly repealed was not within the intent of the Legislature.**

*Hasset* v. *Welch*, 303 U. S. 303;
*Helvering* v. *Marshall*, 303 U. S. 303.

*In Hasset* v. *Welch* and *Helvering* v. *Marshall,* supra, Mr. Justice Roberts said at page 314:

> "Adoption of a statute does not include subsequent addition or modification unless it does so by express intent. (See Point 4 of brief submitted below.) The express intent here seems to have been to repeal Sections 36, 36a, Section 36b renumbered 36a seems to be in irreconcilable conflict with Section 36c should be disregarded and Section 36c last in point of time should be adopted. The Legislature modified Section 36 by striking out the Board of Estimate elective officers without notice and an opportunity to defend in violation of the 14th Amendment to the Federal Constitution, and in direct contravention of Art. 1, Sec. 11; Art. 6, Sec. 9, Sub. 2; Art. 13, Sec. 2 of the Constitution of the State of New York. The act in question seems to have disregarded the restriction placed upon the Legislature by the Constitution of the State of New York. 36b renumbered 36a seems to be in irreconcilable conflict with Section 36c renumnumbered Section 38 the Court should declare the abrogation of the earlier and Section 36c last in point of time and position is to be adopted as the existing law (Point 5 of brief submitted below)."

## POINT 5.

**Where a variance exists between the certificate of Secretary of State and the publication of the Session Laws, the certificate of Secretary of State prevails.**

*Kucher* v. *Gates Container Corp.,* 263 Ap. 1006.

This was a per curiam opinion from Second Department. It is one of the duties of Secretary of this State to see that the Session Laws are printed and for that reason alone his

certificate seems controlling. Said certificate was supplied in brief in Court of Appeals by virtue of Section 105 of the Civil Practice Act, and as a general rule is accepted on appeal. Evidence of this character was received by the United States Court of Appeals for the Second Circuit in *De Luca* v. *Atlantic Refining Co.*, decided July 18, 1949, reported in the New York Law Journal Friday, August 12, 1949. There are like decisions in the State of New York. They are as follows:

*Stemmler* v. *Mayor, etc.*, 179 N. Y. 473;
*Matter of City of New York*, 218 N. Y. 274;
*People* v. *M. Flack*, 216 N. Y. 123;
*People* v. *Travis*, 257 N. Y. 474.

These cases hold that evidence of the character cannot be changed, the credibility of which is not open to attack.

## POINT 6.

### The dismissal of petitioner's appeal was reversible error.

*Halfpenny* v. *Miller*, 232 Fed. 115;
*Matter of Gage*, 141 N. Y. 112, 114.

Circuit Judge Woods said at page 115:

> "Motion to dismiss appeals without consideration of the merits should not be granted, except when it clearly appears that there has been a fatal failure to comply with legal requirement. On the principle that all doubts should be resolved in favor of retaining an appeal for decision on the merits. The motion to dismiss is refused.
>
> The latter holding that if any question remains dismissal is not in order. There were many questions before the Court upon which petitioner's rights depend is a stronger reason that the dismissal should have been denied."

## POINT 7.

**The theory of the transit commission's report, purely speculative, has been held immaterial.**

*Simpson* v. *Shepard*, 230 U. S. 352.

In the instant case Mr. Justice Hughes said at page 452:

> "The act of reproduction methods is of service in ascertaining the present value of the plant. When it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

## POINT 8.

**All moneys collected in excess of 5 cents including 2 cents for transfers are forfeited to the State as of July 1st, 1948, to and including the final determination of this appeal, as violative of existing laws.**

*Litchler, et al.* v. *United States,* 334 U. S. 783, 787.

Mr. Justice Burton said at page 787:

> "The collection of re-negotiated excess profits on a war subcontractor is not in the nature of a penalty and is not a deprivation of a subcontractor of his property without due process of law in violation of the Fifth Amendment."

## POINT 9.

**All moneys collected by defendants in excess of five cents including two cents for transfers are forfeited to the State as of July 1, 1948, up to and including the final determination of this appeal.**

## POINT 10.

**The errors of the Court below and the conduct of defendants seem an exercise of arbitrary power in government.**

*Jones* v. *Securities Commission,* 298 U. S. 1, 24;
*Garfield* v. *Goldsby,* 211 U. S. 249, 262;
*Atkins* v. *Kansas,* 191 U. S. 207, 223.

In *Jones* v. *Securities Commission,* supra, Mr. Justice Sutherland said:

> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict."

To the same effect, Mr. Justice Day said in *Garfield* v. *Goldsby,* supra:

> "There is no place in our Constitutional system for the exercise of arbitrary power."

In *Atkin* v. *Kansas,* supra, this Court held:

> "It is the solemn duty of the Court in cases before them to guard the Constitutional rights of the citizen against merely arbitrary power."

It is not the intention of petitioner to waive any point raised below as reference is made to them in the specification of errors. I believe it would burden this Honorable Court to read a more lengthy brief.

## *Conclusion.*

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the questions here involved may be permanently settled by this Honorable Court and a proper construction and interpretation made and injustice prevented, and that to such an end a writ of certiorari should be granted and this Court should review the decision of Mr. Justice Hecht of Special Term, Part 3 of the Supreme Court and finally reverse it.

Respectfully submitted,

WALTER N. SMITH,
*Appearing in Person Petitioner.*